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VALIDITY OF A CONTRACT TO BUY AND SELL ALL THE GOODS NEEDED BY A BUYER IN HIS BUSINESS.—A contract to buy and sell all the goods the buyer needs or wants in his business for a certain time is, at first glance, open to two objections: it is uncertain as to quantity, and it lacks mutuality. By mutuality is meant not mutuality of remedy, as it is used in the courts of Equity, but mutuality of obligation which exists when mutual promises constitute the consideration for each other. The above objections were decisive of the early cases on contracts of this type, of which the case of *Bailey v. Austrian* is representative.¹ In that case a contract to purchase all the pig iron wanted by the vendee in his foundry business for a given period was held invalid for the reason that "there was no absolute engagement on the vendee's part to want and to purchase any iron of the vendor, and hence no mutuality of engagement." This decision was followed by the same court in a case involving a contract to furnish to a retailer all the shoe packs required in his business that season.²

In later cases decided in other jurisdictions, a broader view was taken of the question. The courts reasoned that where the vendee is engaged in an established business so that his requirements of the commodity are readily ascertainable, the contract is not without certainty as to quantity since *id certum est, quod certum reddi potest*. Moreover, if the vendee promises to buy all of a certain commodity he will need or require for a certain time in that business, he is bound by the promise and there is no lack of mutuality. The great weight of modern authority is in accord with this latter view. The business is usually that of a manufacturer³; but the question has arisen in the case of hotel proprietors,⁴ steamship owners,⁵ contractors,⁶ and retail dealers,⁷ and

¹ 19 Minn. 535 (1873).

² *Tarbox v. Gotzian*, 20 Minn. 140 (1873).

³ *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427 (1884). *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459 (1903). *Fertilizer Co. v. Phosphate Co.*, 121 Fed. 298 (1903). *Lima Locomotive Co. v. Steel Castings Co.*, 155 Fed. 77 (1907). *Sterling Coal Co. v. Bleaching Co.*, 162 Fed. 848 (1908). *Marx v. Malting Co.*, 169 Fed. 582 (1909). *Holmes v. Detroit*, 158 Mich. 137, 122 N. W. 506 (1909). *Healy v. Alcohol Mfg. Co.*, 125 La. Ann. 1038, 52 So. 150 (1910). *Mining Co. v. Mining Co.*, 188 Fed. 179 (1911). *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal. App. 671, 117 Pac. 934 (1911). *Contra: Bessire v. Corn Products Mfg. Co.*, 47 Ind. App. 298, 94 N. E. 353 (1911).

⁴ *Smith v. Morse*, 20 La. Ann. 220 (1868).

⁵ *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142 (1891).

⁶ *Campfield v. Sauer*, 164 Fed. 833 (1908). *Rosenthal v. Brick Co.*, 108 N. Y. S. 347 (1908). *Stuart v. Telephone Co.*, 161 Mich. 123, 125 N. W. 720 (1910).

⁷ *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774 (1895). *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241 (1900). *Secor v. Ardsley Ice Co.*, 201 N. Y. 603, 95 N. E. 1139 (1909). *Walker Mfg. Co. v. Swift & Co.*, 200 Fed. 529 (1912). *Metzger v. Knox*, 137 N. Y. S. 1129 (1912). *Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984 (1915). *Scott v. Stevenson Co.*, 130 Minn. 151, 153 N. W. 316 (1915). On the other hand some

where the words "need" or "require" are used, the contracts are usually held valid. However, where the engagement is to buy and sell what the vendee may "want" or "desire," even though he is engaged in an established business, the contract is held invalid for uncertainty and lack of mutuality, the quantity to be purchased being not certain, but dependent upon the will or wish of the vendee.⁸ Where the buyer has no established business, the contract is invalid regardless of whether his promise is to purchase what goods he "wants" or what he "requires."⁹ In a case where there was an established business but no mention of quantity, the court refused to imply an agreement to buy all the materials needed in the buyer's business.¹⁰

In three recent cases the question here discussed was at issue.¹¹ Those of *Wickham & Burton Coal Co. v. Farmers Lumber Co.* and *Hutchinson Gas Co. v. Wichita Gas Co.* concern contracts of a vendee in an established business to buy what quantity he will want. In the former case the engagement was to buy all the coal which the vendee would want to purchase for seven months at a certain price; in the latter, the engagement was to take gas for a city which the vendee supplied, but the vendee was not bound to take its gas exclusively from the vendor. In both cases the contracts were held invalid for uncertainty and lack of mutuality. In the case of *American Trading Co. v. National Fibre Co.*, a demurrer was sustained to a declaration which alleged a contract to buy and sell respectively the vendee's entire consumption of vulcanized fibre for one year, but which did not aver that the vendee was in an established business using a determinable quantity of the material. This amounts to a "requirement" case where the vendee is not in an established business. The three cases afford excellent illustrations of the contracts of this class which are most often held invalid and lacking in mutuality.

Although the rule as stated is well established, there is one question arising in this class of cases which is not so clearly settled: granting that the contract is valid, what is the extent of the vendee's obligation? Is he bound by the contract to remain in the established business for the time covered by the contract and to

courts hold that a retail dealer or middle-man does not come within the rule, which they restrict to cover the case of an established business in which the use of the thing required is but incidental to the carrying on of the business itself. *Crane v. Crane*, 105 Fed. 869 (1901). *Jenkins & Co. v. Anaheim Sugar Co.*, 247 Fed. 958 (1918).

⁸ *Drake v. Vorse*, 52 Ia. 417, 3 N. W. 465 (1879). *American Cotton Oil Co. v. Kirk*, 68 Fed. 791 (1895). *Hoffman v. Maffioli*, 104 Wis. 630, 80 N. W. 1032 (1899). *Higbie v. Rust*, 211 Ill. 333, 71 N. E. 1010 (1904).

⁹ *Rehm-Zeiber Co. v. F. G. Walker Co.*, 156 Ky. 6, 160 S.W.777 (1913).

¹⁰ *Cold Blast Transportation Co. v. Kansas City Bolt and Nut Co.*, 114 Fed. 77 (1902).

¹¹ *Wickham & Burton Coal Co. v. Farmers Lumber Co.*, 179 N. W. 417 (Iowa, 1920). *Hutchinson Gas Co. v. Wichita Gas Co.*, 267 Fed. 35 (1920). *American Trading Co. v. National Fibre Co.*, 111 Atl. 290 (Del. 1920).

buy the quantity of the goods ordinarily required by the business; or is his promise merely to buy from the vendor if he buys at all, a promise which is broken only by buying from someone else? It was held in a New York case¹² that a vendee, having promised to buy all the coal his steamships required for one year was liable for the coal even though he sold his steamships and went out of the business. On the other hand a Pennsylvania case¹³ decided that a vendee who promised to buy all the coal he should need for his mill for a certain time did not break his contract by ceasing to use coal on the discovery of gas on the premises. The view that the only obligation of the vendee is to refrain from buying the commodity from anyone other than the vendor is satisfactory from the standpoint of mutuality, for such a promise is sufficient detriment to be good consideration for the vendor's promise; but when it is considered that certainty, no less than mutuality, is necessary to establish the validity of this type of contract, the view taken in the New York case seems to be the correct one. If it is granted that a contract is certain as to quantity because that quantity is ascertainable, it would seem to follow that the parties should be bound by that quantity,—the quantity which was in the contemplation of the parties when they contracted and which was fixed by the ordinary needs of an established business.

L. H. McK.

THE EXCLUSION OF A COMMODITY FROM TRANSPORTATION IS A CLASSIFICATION AND REGULATION UNDER INTERSTATE COMMERCE ACT.—The jurisdiction of the Interstate Commerce Commission is a question which has frequently been before the courts for determination. But in a recent case there was presented to the Supreme Court of the United States for the first time the question whether under the powers granted by the Interstate Commerce Act the Commission had jurisdiction to determine the reasonableness of the proposal of the railroads to exclude from shipment a commodity which had been transported for many years.¹ The Director General of Railroads had issued an order² cancelling the

¹² Wells v. Alexandre, *supra*. See also: Fertilizer Co. v. Phosphate Co., *supra*. Hickey v. O'Brien, *supra*.

¹³ McKeever, Cook & Co. v. Canonsburg Iron Co. 138 Pa. 184, 20 Atl. 938 (1888). See also: Drake v. Vorse, *supra*, and note on Hickey v. O'Brien in 14 Harvard Law Review 150.

¹ Director General of Railroads, et al., v. The Viscose Company, U. S. Supreme Court Advance Opinions, decided Jan. 3, 1921.

² The order was issued on Jan. 21, 1920, under authority conferred by the Federal Control Act (40 Stat. 451, 456). This same Act took away from the Commission the power to suspend classifications or regulations when issued by the President; but the power over them after hearing remained, and the power to suspend was restored when the Transportation Act of 1920 (41 Stat. 456, 487) became effective. The action of the Director General of Railroads, under consideration in the principal case, may, therefore, be treated as if it had been taken by a carrier subject to the Act. Director General of Railroads, et al., v. Viscose Company, *supra*.